

**38 CFR Part 38****RIN 2900-AR37****Reconsideration of Prior Interment and Memorialization Decisions**

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations to implement VA's authority to reconsider a prior decision to inter or honor the memory of a person in a VA national cemetery. As of December 20, 2013, VA was authorized to reconsider a prior decision to inter or memorialize an individual who was convicted of a Federal or State capital crime or tier III sex offense. In addition, VA was authorized to reconsider a prior decision to inter or memorialize an individual who committed a Federal or State capital crime but was not convicted of such crime because that individual was not available for trial due to death or flight to avoid prosecution. This proposed rule would implement review criteria and procedures for reconsideration of prior interment or memorialization decisions.

DATES: Written comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on

the following website as soon as possible after they have been received: <http://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Artis Parker, Executive Director, Office of Field Programs, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Telephone: (314) 416-6304 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On June 5, 2012, the National Cemetery Administration (NCA) found Michael LaShawn Anderson eligible for burial at Fort Custer National Cemetery and buried him on June 7, 2012. On July 27, 2012, NCA was informed by a concerned individual that before Mr. Anderson died, he shot and killed Ms. Alicia Koehl before he killed himself. At that time, VA had no authority to reconsider burial decisions for eligible individuals, which were considered permanent and final.

On December 20, 2013, the Alicia Dawn Koehl Respect for National Cemeteries Act (the "Act"), Pub. L. 113-65, was enacted, which specifically authorized VA to disinter the remains of Michael LaShawn Anderson from Fort Custer National Cemetery. VA was required to notify Mr. Anderson's next of kin of record of the impending disinterment of his remains and, upon disinterment, relinquish the remains to the next of kin of record

or arrange for an appropriate disposition of remains if the next of kin of record is unavailable.

In addition, the Act amended 38 U.S.C. 2411 to authorize VA to reconsider prior decisions to inter or memorialize individuals who were convicted of a Federal capital crime, a State capital crime, or a Federal or State tier III sex offense, in which the conviction was final. VA may also reconsider prior decisions to inter or memorialize individuals who were later found to have committed a Federal or State capital crime but were not convicted due to death or flight to avoid prosecution. The term “Federal capital crime” is defined at section 2411(f)(1) to mean “an offense under Federal law for which a sentence of imprisonment for life or the death penalty may be imposed.” The term “State capital crime” is defined at section 2411(f)(2) to mean, “under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which a sentence of imprisonment for life or the death penalty may be imposed.” The term “tier III sex offense” is defined at section 2411(b)(4) to mean “a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act” (now found at 34 U.S.C. 20901 et seq.). An individual who was convicted of a Federal or State tier III sex offense must also have been sentenced to a minimum of life imprisonment. VA’s reconsideration authority applies to any interment or memorialization in a VA national cemetery after the date of the Act’s enactment on December 20, 2013.

VA proposes to add new 38 CFR 38.622 to implement this statutory reconsideration authority. Section 38.622(a) would provide general information about the reconsideration authority and designate the Under Secretary for Memorial Affairs (USMA) as the appropriate Federal official who may reconsider prior interment and memorialization decisions. This level of decision-making authority for reconsideration purposes would be consistent with existing authority for cases involving application of

the section 2411 bar for interment and memorialization at national cemeteries. See 38 CFR 38.617 (referring to “the affected cemetery director, or the [USMA], or his or her designee” to make determinations involving the section 2411 bar); 38.618 (requiring the USMA to make a finding of whether a deceased individual committed a Federal or State capital crime for which he or she was not convicted due to death or flight).

Proposed § 38.622(b) and (c) would describe instances that may result in reconsideration of prior interment and memorialization decisions under criteria defined in 38 U.S.C. 2411(d)(2)(A). In the analysis that follows, we explain each circumstance in which VA would reconsider a prior interment or memorialization decision and include references to the applicable statutory provision that imposes the bar to benefits. We propose, to the extent practicable, to continue to apply existing standards and procedures relating to the bar to interment and memorialization benefits under section 2411 to implement the reconsideration authority to maintain clarity and consistency in VA’s decision-making.

Basis for Application of the Reconsideration Authority

Proposed § 38.622(b) would describe two scenarios where reconsideration of a prior interment or memorialization decision may be established by a Federal or State criminal conviction. Under proposed § 38.622(b)(1), VA may reconsider a prior interment decision if VA receives written notification (38 U.S.C. 2411(a)(2), (d)(1), (e)(1)(A)) from the United States Attorney General or an appropriate State official of a final conviction of a person interred or memorialized in a national cemetery who was convicted of a Federal capital crime (38 U.S.C. 2411(b)(1)), a State capital crime (38 U.S.C. 2411(b)(2)), or a Federal or State tier III sex offense meeting the requirements of 38 U.S.C. 2411(b)(4).

Under proposed § 38.622(b)(2), VA may reconsider a prior interment or memorialization decision if VA has not received notification described in § 38.622(b)(1),

but VA has reason to believe that a person interred or memorialized in a national cemetery may have been convicted of a Federal or State capital crime meeting the requirements of 38 U.S.C. 2411(b)(1) or (2), respectively, or may have been convicted of a Federal or State tier III sex offense meeting the requirements of 38 U.S.C. 2411(b)(4). These proposed provisions for reconsidering a prior interment or memorialization decision correspond to the two bases for applying the section 2411 bar to decedents convicted of a Federal or State capital crime or sex offense.

In proposed § 38.622(c), VA may reconsider a prior interment or memorialization decision when a cemetery director, after completing an official inquiry, determines that there appears to be clear and convincing evidence that a person interred or memorialized in a national cemetery committed a Federal or State capital crime but was not convicted due to death or flight to avoid prosecution (38 U.S.C. 2411(b)(3) and (c)). In such a case, the cemetery director would recommend that the USMA reconsider VA's decision to inter or memorialize the decedent. This proposed provision for reconsideration of prior interment or memorialization decisions would correspond to application of the statutory bar to benefits for decedents who avoided prosecution and conviction of a Federal or State capital crime due to death or flight.

When a cemetery director forwards a case to the USMA for decision, for one of the three circumstances described in § 38.622(b)(1), (b)(2), or (c), and the USMA decides to reconsider VA's prior interment or memorialization decision, the USMA must provide written notification as proposed in § 38.622(d).

Procedural Guidance for Reconsideration of Prior Interment and Memorialization Decisions – Conviction

Under proposed § 38.622(d)(1), if VA learns that the deceased was convicted of a Federal or State capital crime or sexual offense, either based on notification of the conviction (§ 38.622(b)(1)) or after an inquiry (§ 38.622(b)(2)), and if the USMA decides

to disinter or remove a memorial headstone or marker, NCA would provide a copy of the written notice of the USMA's reversal decision to the decedent's next of kin or other person authorized to arrange for the interment or memorialization of the decedent (i.e., personal representative) (38 U.S.C. 2411(d)(2)(A)(i)). The USMA's written notice of decision would be in accordance with 38 U.S.C. 5104 (Decisions and notices of decisions) and include the following information: (1) identification of the issues adjudicated; (2) a summary of the evidence considered by the USMA; (3) a summary of the applicable laws and regulations; (4) identification of findings favorable to the claimant; (5) identification of elements leading to the decision to disinter; (6) an explanation of how to obtain or access evidence used in making the decision; and (7) an explanation of appeal rights, which includes the notice of the opportunity to file a notice of disagreement with the decision of the USMA within 60 days from the date of the notice (38 U.S.C. 2411(d)(2)(B) and (3)(A)).

Procedural Guidance for Reconsideration of Prior Interment and Memorialization

Decisions – Death or Flight

Proposed § 38.622(d)(2) would outline the process that VA would follow for cases where the cemetery director determines that there appears to be clear and convincing evidence that the decedent avoided being convicted for a Federal or State capital crime due to death or flight. In these instances, if the USMA decides to reconsider the interment or memorialization decision, the USMA would provide the decedent's next of kin or other person authorized to arrange for the interment or memorialization of the decedent (i.e., personal representative) with written notice that VA has reason to believe that the decedent may have committed a Federal or State capital crime and the USMA is reconsidering VA's prior decision to inter or memorialize the decedent. This notice would also provide the next of kin or personal representative with procedural options should they disagree. The notice of procedural options would

inform the decedent's next of kin or personal representative that they may, within 15 days of receipt of notice: request a hearing on the matter; submit a written statement, with or without supporting documentation, for inclusion in the record; or waive a hearing and submission of a written statement. If a hearing is requested, the District Executive Director would conduct the hearing.

The purpose of the hearing would be to permit the personal representative of the deceased to present evidence concerning whether the deceased committed a crime that would render the deceased ineligible for interment or memorialization in a national cemetery. Testimony at the hearing would be presented under oath, and the personal representative would have the right to representation by counsel and the right to call witnesses. The VA official conducting the hearing would have the authority to administer oaths. The hearing would be conducted in an informal manner and court rules of evidence would not apply. The hearing would be recorded on audiotape and, unless the personal representative waives transcription, a transcript of the hearing would be produced and included in the record. After the completion of the procedural options period (including hearing, if requested), the USMA would then decide whether there is clear and convincing evidence that the decedent committed a Federal or State capital crime for which the decedent was not convicted due to the decedent's unavailability for trial due to death or flight to avoid prosecution.

If the USMA decides that clear and convincing evidence does not exist, NCA would notify the next of kin or personal representative that the decedent may remain interred or that the decedent's memorial headstone or marker may remain in the national cemetery. If the USMA decides that clear and convincing evidence does exist, and the USMA further decides to disinter the remains or remove the memorialization, NCA would provide written notice of the decision to the decedent's next of kin or personal representative in accordance with 38 U.S.C. 5104 that includes notice of

appellate rights in accordance with 38 CFR 19.25, following the same notification of decision process in cases of Federal or State capital crime or sexual offense convictions (38 U.S.C. 2411(d)(2)(B) and (3)(A)) in proposed § 38.622(d)(1).

Appeal of Decision to Disinter or Remove Memorialization

Proposed § 38.622(d)(3) references VA actions after receiving a notice of disagreement from the next of kin or personal representative. As mentioned above, a notification of decision letter from NCA would include an opportunity to file a notice of disagreement with the decision within 60 days of the date of the notice (38 U.S.C. 2411(d)(3)(A)). Once the notice of disagreement is reviewed and the appellate process is completed, if the Board of Veterans' Appeals overturns the USMA's decision to disinter the decedent or remove the decedent's memorial headstone or marker, NCA would notify the next of kin or personal representative that the decedent may remain interred or memorialized. However, if the USMA's decision to disinter the decedent or remove the decedent's memorial headstone or marker is affirmed at the completion of the appellate process, the cemetery director would provide written notification to the decedent's next of kin or personal representative of this decision.

Disinterment and Removal of Memorialization

Proposed § 38.622(e) would describe VA actions when the decision to disinter or remove a memorial headstone or marker becomes final given the next of kin's or personal representative's failure to timely appeal the decision or by final disposition of the appeal. VA would take the following actions as applicable: disinter the remains and provide for reinterment or other appropriate disposition of remains in a place other than a Veterans cemetery (which includes but is not limited to a VA national cemetery or State or Tribal Veterans Cemetery) or remove the memorial headstone or marker placed to honor the memory of the deceased (38 U.S.C. 2411(d)(4)).

In the case of disinterment, the cemetery director would contact the next of kin or other person authorized to arrange for the deceased's interment or memorialization (i.e., personal representative) to coordinate the transfer of remains from the national cemetery to another location. The next of kin or personal representative would have 30 days to respond to this notification. If the next of kin or personal representative responds to the notice within the 30-day period, VA would attempt to coordinate a date and time for the disinterment and release of the decedent's remains to the next of kin or personal representative. VA would perform the disinterment. However, the decedent's next of kin or personal representative would have to bear the responsibility and cost of transporting remains from the cemetery, in compliance with applicable state laws concerning the disinterment and transport of remains from the national cemetery, as well as costs associated with subsequent disposition of the remains.

If the next of kin or personal representative does not respond to the notice within the 30-day period, declines to accept the decedent's remains, or does not appear at the agreed upon time and place to accept the remains, VA would determine a suitable cemetery for the disposition of the decedent's remains and would make all necessary arrangements to disinter, transport, reinter, and mark the grave of the decedent with a non-government headstone or marker in accordance with sec. 2411(d)(4)(A) within a reasonable time frame. VA would then notify the next of kin or personal representative of the date and time on which the disinterment was performed and the new location of the decedent's remains.

In the case of a memorial headstone or marker, the cemetery director would remove the headstone or marker from the cemetery, dispose of it in accordance with NCA policy, and notify the next of kin or personal representative of the date on which this action was taken.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This proposed rule directly affects the individuals and establishments that may be involved with the transfer of remains process (e.g., next of kin or personal representative of the decedent and funeral homes). However, based on the anticipated aggregate number of cases involving disinterment or removal of memorialization headstones or markers, the VA does not consider the economic impact to be significant to small entities. Since the 2013 enactment of the reconsideration authority in 38 U.S.C. 2411, VA has made only 7 reconsideration decisions in total. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of sections 603 and 604 do not apply.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action

under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

List of Subjects in 38 CFR part 38

Administrative practice and procedure, Cemeteries, Claims, Grants programs, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on February 7, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 38 is proposed to be amended as follows:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2400, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. Add § 38.622 to read as follows:

§ 38.622 Reconsideration of prior interment and memorialization decisions.

(a) *General.* (1) The Under Secretary for Memorial Affairs (USMA) is the appropriate Federal official who may reconsider a prior decision to inter the remains or honor the memory of a person in a national cemetery.

(2) This section sets out the evaluative criteria and procedures for VA to reconsider prior interment and memorialization decisions for decedents who are subsequently found to have committed or to have been convicted of certain criminal acts that would prohibit them from receiving benefits to which they are otherwise entitled.

(b) *Capital Crime or Sex Offense Conviction.* (1) Upon written notification from the United States Attorney General or an appropriate State official that a person interred or memorialized in a national cemetery after December 20, 2013, was convicted of a Federal or State capital crime and whose conviction meets the requirements of 38 U.S.C. 2411(b)(1) or (2), respectively, or was convicted of a Federal or State tier III sex offense and meets the requirements of 38 U.S.C. 2411(b)(4), the USMA may, upon

reconsideration, decide to disinter the remains or remove the memorial headstone or marker of such person from the cemetery.

(2) If VA has not initially received notification referred to in paragraph (b)(1) of this section, but a cemetery director has reason to believe that a person interred or memorialized in a national cemetery after December 20, 2013, may have been convicted of a Federal or State capital crime meeting the requirements of 38 U.S.C. 2411(b)(1) or (2), respectively, or may have been convicted of a Federal or State tier III sex offense meeting the requirements of 38 U.S.C. 2411(b)(4), the cemetery director will initiate an inquiry to the United States Attorney General or appropriate State official for confirmation and provide the results of such inquiry to the USMA in cases where a conviction is confirmed, which will initiate a reconsideration. The USMA will render a decision on disinterment or memorial headstone or marker removal after reviewing the results of the inquiry submitted by the cemetery director.

(c) Avoidance of Capital Crime Conviction Due to Death or Flight. (1) If a cemetery director has reason to believe that a person interred or memorialized in a national cemetery after December 20, 2013, may have committed a Federal or State capital crime but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director will initiate an official inquiry seeking information from Federal, State, or local law enforcement officials, or other sources of potentially relevant information.

(2) If, after conducting the inquiry, the cemetery director determines that there appears to be clear and convincing evidence that the decedent committed a Federal or State capital crime for which the decedent was not convicted because the decedent was unavailable for trial due to death or flight to avoid prosecution, the cemetery director will provide this information to the USMA who will decide whether to reconsider the prior decision to inter or memorialize the decedent. If the USMA decides to reconsider the

prior interment or memorialization decision, the USMA will provide notice of procedural options and follow the procedures in paragraph (d)(2).

(d) *VA Notice of Decision.* (1) For cases involving a Federal or State capital crime or a tier III sexual offense conviction, where the USMA decides to disinter or remove a memorial headstone or marker, NCA will provide written notice of that decision to the decedent's next of kin or personal representative. The written notice of decision will be in accordance with 38 U.S.C. 5104 and will include a notice of appellate rights in accordance with 38 CFR 19.25. This notice of appellate rights will include notice of the opportunity to file a notice of disagreement with the decision of the USMA within 60 days from the date of the decision notice.

(2) In cases in which a cemetery director has reason to believe that a person interred or memorialized in a national cemetery after December 20, 2013, may have committed a Federal or State capital crime, as described in 38 U.S.C. 2411(f)(1) and (2), but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution, should the USMA decide to reconsider the prior interment or memorialization, prior to rendering written notice of final decision, VA will follow the following process:

(i) NCA will provide a notice of procedural options, which will inform the decedent's next of kin or personal representative that VA is reconsidering the prior interment or memorialization of the decedent and that they may, within 15 days of receipt of notice: request a hearing on the matter; submit a written statement, with or without supporting documentation, for inclusion in the record; or waive a hearing and submission of a written statement.

(ii) If a hearing is requested, the District Executive Director will conduct the hearing. The purpose of the hearing is to permit the personal representative of the deceased to present evidence concerning whether the deceased committed a crime

that would render the deceased ineligible for interment or memorialization in a national cemetery. Testimony at the hearing will be presented under oath, and the personal representative will have the right to representation by counsel and the right to call witnesses. The VA official conducting the hearing will have the authority to administer oaths. The hearing will be conducted in an informal manner and court rules of evidence will not apply. The hearing will be recorded on audiotape and, unless the personal representative waives transcription, a transcript of the hearing will be produced and included in the record.

(iii) Following a hearing or the timely submission of a written statement, or in the event a hearing is waived or no hearing is requested and no written statement is submitted within the time specified, the USMA will decide whether there is clear and convincing evidence that the decedent committed a Federal or State capital crime for which the decedent was not convicted due to the decedent's unavailability for trial due to death or flight to avoid prosecution. If the USMA decides that clear and convincing evidence does not exist, the USMA will notify the next of kin or personal representative that the decedent may remain interred or that the decedent's memorial headstone or marker may remain in the national cemetery. If the USMA decides that clear and convincing evidence exists, the USMA will provide written notice of the decision to disinter the decedent or remove the decedent's memorial headstone or marker. The written notice of decision will be in accordance with 38 U.S.C. 5104 and will include a notice of appellate rights in accordance with 38 CFR 19.25. This notice of appellate rights will include notice of the opportunity to file a notice of disagreement with the decision of the USMA within 60 days from the date of the notice.

(3) Action following receipt of a notice of disagreement with reversal of an interment or memorialization decision under this section will be in accordance with 38 CFR part 19.

(e) *Disinterment or Removal of Memorialization.* A decision to disinter the remains or remove a memorial headstone or marker becomes final either by failure of the next of kin or personal representative to appeal the decision or by final disposition of the appeal. In such cases, the cemetery director shall take the following actions:

(1) In the case of disinterment, the cemetery director will contact the next of kin or personal representative to coordinate the transfer of remains from the national cemetery to another location. The next of kin or personal representative will have 30 days to respond to the cemetery director.

(i) If the next of kin or personal representative responds to the notice within the 30-day period, the cemetery director will coordinate a date and time for the disinterment and release of the decedent's remains to the next of kin or personal representative for transport from the national cemetery to a place determined by the next of kin or personal representative. The cemetery director will perform the disinterment. The next of kin or personal representative will bear responsibility and cost for transportation of the remains from the cemetery, including compliance with applicable state laws concerning the disinterment and transport of remains from the national cemetery, and any costs associated with the subsequent disposition of remains.

(ii) If the next of kin or personal representative does not respond to the notice within the 30-day period, indicates refusal to accept the decedent's remains, or fails to appear, the cemetery director will determine a suitable cemetery for the disposition of the decedent's remains and, at government expense, will make all necessary arrangements to disinter, transport, reinter, and mark the grave of the decedent with a non-government headstone or marker within a reasonable time frame. The non-government headstone or marker will include the decedent's name, date of birth, and date of death. The cemetery director will then notify the next of kin or personal

representative of the date and time on which the disinterment was performed and the new location of the decedent's remains.

(2) In the case of a memorial headstone or marker, the cemetery director will remove the headstone or marker from the cemetery and notify the next of kin or personal representative of the date on which this action was taken.

(Authority: 38 U.S.C. 512, 2411)

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